No. 632

# In the Supreme Court of the United States

OCTOBER TERM, 1940

DETROIT TRUST COMPANY (FORMERLY STATE TRUST COMPANY), A MICHIGAN CORPORATION, EXECUTOR OF THE WILL OF CORNELIA O. CURTIS, DECEASED, PETITIONER

v.

FRED L. WOOLVERTON, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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*v.*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The District Court rendered no opinion but entered judgment upon special findings of fact and conclusions of law (R. 47–55). The opinion of the Circuit Court of Appeals (R. 76) is reported in 110 F. (2d) 829. The Circuit Court of Appeals rendered no opinion in connection with its orders of September 16, and October 16, 1940 (R. 93, 95), now sought to be reviewed.

## JURISDICTION

The orders of the Circuit Court of Appeals sought to be reviewed were entered September 16, and October 16, 1940. (R. 93, 95.) The petition for a writ of certiorari was filed December 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

## QUESTION PRESENTED

The only question presented is as to the content or proper interpretation of an oral pre-trial agreement between counsel.

## STATEMENT

This suit was brought by petitioner's corporate predecessor to recover federal income taxes assessed against and paid by it as executor of the will of Cornelia O. Curtis, deceased, for the calendar year 1917. The declaration, filed August 2, 1929, alleged various facts and conclusions purporting to state a cause of action for the recovery of the taxes (R. 5–30). The Collector entered a "Plea of Defendant and Notice of Special Defenses"; therein he demanded a trial of the matters set forth in the declaration and under the plea of general issue interposed and set forth three special defenses (R. 33–40, 43–46). The second of these defenses was that prior to the payment of a portion of the taxes the taxpayer had given a bond, and that the payments thereafter

made were made in satisfaction of the bond and not as payments of taxes (R. 33–35). The third defense was that the action was barred by the statute of limitations (R. 45–46).

Thereafter, by oral agreement of counsel at a conference in the judge's chambers, a jury was waived and a trial was had limited to the issues raised by the Collector's affirmative defenses (R. 54). Following this trial the District Court made findings of fact and conclusions of law sustaining the second and third special defenses (R. 47–54) and entered judgment that the action be dismissed (R. 54–55).

Upon petitioner's appeal, the Circuit Court of Appeals for the Sixth Circuit reversed the judgment of the District Court and remanded the case "for further proceedings in accordance with the opinion of this court" (R. 75). In rejecting the defense based on the bond, the court said: "the Government is in no way harmed by now permitting the obligor to have its day in court to contest the legality of the assessment" (R. 80).

Thereafter petitioner filed in the Circuit Court of Appeals a motion to modify and clarify the mandate of that court, so as to direct the District Court to enter judgment for the plaintiff in the amount sued for (R. 83–85). In its brief in support of this motion petitioner contended that by the oral agreement counsel for the Collector waived proof of the illegal exaction and elim-

inated all issues other than the affirmative defenses (R. 87). Upon consideration of this motion the Circuit Court of Appeals amended its mandate so as expressly to provide for a new trial, and denied the motion in all other respects (R. 75, 93). A further motion of petitioner to reconsider the order amending the mandate was denied on October 16, 1940 (R. 95).

## ARGUMENT

Petitioner seeks, in essence, to obtain judgment for the recovery of taxes (in amount $664,791.26 plus interest) without a trial upon the merits: petitioner's contention is that counsel for the Collector by an oral (and unreported) agreement waived trial upon the merits. This contention, peculiar as it is to the case, does not warrant review by this Court.

Further, petitioner's claim is improbable on its face and the record is bare of any support for it. The affirmative defenses were interposed "under the plea of general issue" (R. 33). We contend that all parties, and the court, understood that while the separate defenses were to be adjudicated first, because if they were upheld there would be no necessity for a lengthy trial upon the merits, that if they were rejected the case would then proceed to trial upon the merits. The agreement of counsel was not reduced to writing or reported, and the opening remarks of Assistant District Attorney Smith at the trial, quoted in

the petition for certiorari (pp. 8–9), do not in fact reflect the entire agreement and understanding. But regardless of that, the fair import of his remarks is that the hearing was only a preliminary one, agreed to for the reason that if the special defenses were sustained a lengthy trial on the merits, which would otherwise be necessary, would be avoided. The plain implication is that if the special defenses were not sustained the case would proceed to a regular trial upon the merits.

Those of the cases cited by petitioner which are in point on any supposition are so only if petitioner's version of the oral pre-trial agreement be accepted.

## CONCLUSION

The question presented involves only the content or construction of a particular oral pre-trial agreement; hence the petition should be denied.

Respectfully submitted.

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